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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of  
  
Policies and Rules  
Concerning Toll Fraud

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CC Docket No. 93-292

**COMMENTS OF PLANNED PARENTHOOD  
OF NEW YORK CITY, AND REYNOLDS AND REYNOLDS**

Planned Parenthood of New York City ("Planned Parenthood"), and Reynolds and Reynolds ("Reynolds") (referred to herein collectively as "Joint Commenters"), by their attorneys and pursuant to the Commission's Notice of Proposed Rulemaking released in the above-captioned matter on December 2, 1993, ("NPRM")<sup>1</sup> hereby submit their Comments with respect to the new rules and policies proposed by the Commission to address toll fraud.

I. **Introduction**

The Commission instituted this proceeding to address toll fraud--a substantial problem which has weakened the reliability of the U.S. telecommunications infrastructure and financially drained many American businesses. The magnitude and severity of the problem has been well-documented by the press and other sources.<sup>2</sup> The Joint Commenters applaud the Commission's decision to initiate this proceeding, and urge the Commission to adopt a uniform solution to the toll fraud problem.

<sup>1</sup> In re Policies and Rules Concerning Toll Fraud, Notice of Proposed Rulemaking, CC Docket No. 93-292, FCC 93-496, released December 2, 1993.

<sup>2</sup> See, e.g., John J. Haugh, Robert E. Burney, Gregory L. Dean and Lawrence H. Tisch, Toll Fraud and Telabuse (1992) ("Toll Fraud and Telabuse"). According to one source which surveyed 624 telecommunications users with respect to toll fraud during a recent five-year period, the average, aggregate loss per victim attributable to toll fraud was \$125,000. Of those responding, over 70.3% indicated that their telecommunications networks had been penetrated by unauthorized callers over the past five years, and 7% admitted to losses of over \$500,000. Id. Approximately 7% of respondents acknowledged losses of over \$100,000. Id.

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The instant Comments primarily address PBX-remote access toll fraud since each of the Joint Commenters in this proceeding has been the victim of this type of toll fraud. In April-June of 1992, Planned Parenthood's PBX was accessed remotely through its voice mail system, which was manipulated to obtain outgoing dial-tone over which long distance calls could be placed. Invoices for unauthorized long distance calls were received by Planned Parenthood totalling in excess of \$250,000. Planned Parenthood has expended substantial time, money and effort to resolve the matter,<sup>3</sup> and is still in the process of attempting to reach a solution with involved parties.

Reynolds' (formerly COIN, Inc.) PBX was also remotely accessed, but over its 800 number. Perpetrators of the fraud were then able to manipulate the PBX to obtain outgoing dial-tone, over which outgoing calls were placed. Reynolds received invoices for unauthorized calls spanning a single weekend in February 1993 totalling in excess of \$80,000 and, like Planned Parenthood, is still attempting to resolve the matter.<sup>4</sup>

As demonstrated below, the Joint Commenters strongly support the Commission's tentative conclusion that tariff liability provisions of long distance carriers which fail to recognize an obligation by the carrier to warn customers of toll fraud risks are unreasonable. Indeed, the Commission should take the next step and declare unlawful carrier tariff liability provisions which automatically shift liability to the end user regardless of fault on the part of the carrier.

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<sup>3</sup> Planned Parenthood filed an informal complaint with the Commission against the long distance carrier and local exchange carrier involved on October 9, 1992.

<sup>4</sup> Reynolds also filed an informal complaint with the Commission on May 3, 1993, against both of its long distance carriers and its local exchange carrier.

The Joint Commenters also favor the establishment of a Federal policy which would assign liability for toll fraud on the basis of relative fault. Liability apportionment based upon fault will provide the proper economic incentives necessary to ensure that the institutions in a position to combat toll fraud do so.

The Commission's proposal to require manufacturers of PBXs and other telecommunications equipment to issue written warnings as to the risk of toll fraud (including potential financial exposure) should be adopted. The warnings should apply to both newly-registered equipment as well as equipment already in place, and should address the risks of using PBX equipment without changing default codes. The warning requirement applicable to manufacturers should be clarified to encompass manufacturers' sales agents or vendors, upon whom end users frequently rely for instruction as to how to use their PBX system. Finally, the Commission's proposal to enhance coordination in the battle against toll fraud by creating a Federal Advisory Committee should be implemented.

## **II. The Commission's Tariff Modification Proposal Should Be Adopted**

In its NPRM, the Commission tentatively concludes that carrier tariff liability provisions that fail to recognize an obligation by the carrier to warn customers of the risks of using carrier services are unreasonable. NPRM at 13. Further, the Commission also concludes that carriers have an affirmative duty to ensure that these warnings are communicated effectively to customers through, for example, billing inserts, annual notices, or other distribution methods. Id. at 14. The Joint Commenters strongly support the Commission's tentative conclusions.

Incentivizing carriers to warn--including through their tariffs--customers of the risks of toll fraud will enhance consumer education with respect to the problem.<sup>5</sup> Increased user awareness will, in turn, only serve to better protect the user public against fraud. The problem of toll fraud has escalated to its present size largely because carriers, vendors and manufacturers have from the outset ignored (and sometimes discounted) the severity of the problem. Carriers, vendors and manufacturers typically fail to warn end users of the risks of toll fraud.<sup>6</sup> This climate has given toll fraud perpetrators "exactly what they needed to succeed: general ignorance of the threat and millions of easily accessible systems."<sup>7</sup> Thus, education of consumers as to the risk of toll fraud is imperative.

However, simply imposing an affirmative duty to warn upon carriers is not enough. The Commission must directly address carrier tariff liability provisions which, by their terms, make customers responsible for all calls which originate at their premises.<sup>8</sup> Specifically, the Commission should declare that provisions contained in AT&T's tariffs as well as those of other carriers which automatically shift liability to the end user regardless of fault (and

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<sup>5</sup> As discussed infra at 8-12, the Commission also proposes to promote consumer education through warnings which manufacturers would be required to include with PBX equipment.

<sup>6</sup> Even end users suffering toll fraud losses sometimes seek to minimize, or protect the loss from public disclosure, due to fear of negative publicity.

<sup>7</sup> Toll Fraud and Telabuse at 13.

<sup>8</sup> In Chartways Technologies, Inc. v. AT&T Communications, 6 FCC Rcd 2952 (Com Car. Bur. 1991) ("Chartways I") aff'd on rev., Memorandum Opinion and Order, FCC 93-394 (released August 19, 1993), the Commission held that Section 2.4.1.A of AT&T's Tariff No. 1, which states that the "Customer is responsible for the payment of bills for LDMTS," is lawful. Chartways I, at 2954. MCI and Sprint have similar language in their tariff, which, in effect, automatically shifts liability for toll fraud to the end user.

regardless of the warnings which the Commission is proposing) are per se unjust and unreasonable.<sup>9</sup>

Carrier tariff liability provisions which automatically shift liability should be declared unlawful for two reasons. First, the carrier involved may be partially or totally at fault in any given toll fraud situation, but due to tariff liability provisions the carrier may be able to escape liability entirely. For example, carriers may delay notifying end users of an abnormally high volume of calls being placed through the user's numbers or carrier service technicians may bypass security measures for service purposes and thereby allow remote access to a previously secure system.<sup>10</sup> In these and similar circumstances, carrier immunity is clearly inappropriate.

Tariff liability provisions which completely shield the carrier also provide absolutely no incentive for the carrier to update and modify its network, or take other steps, to help prevent toll fraud. The carrier is in a uniquely important position to combat toll fraud, but will have no incentive to do so if allowed to shield itself from liability through its tariff.

In short, the Joint Commenters support the Commission's proposal to impose an affirmative duty upon carriers to warn end users of the risks of toll fraud, but propose the further step that existing tariff liability-limiting provisions be declared unlawful.

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<sup>9</sup> Indeed, the existing tariff liability provisions are logically incompatible with a shared liability concept, which is addressed infra at 6-8. Liability cannot be apportioned or shared on a genuine comparative negligence theory as long as one of the potentially involved parties--the carrier--is automatically shielded from liability by its tariff.

<sup>10</sup> Toll Fraud and Telabuse, at 62.

### **III. The Commission Should Adopt Definitive Liability Apportionment Rules**

In its NPRM, the Commission requests comment on whether to apportion the cost of PBX-based fraud on the basis of which party was in the best position to avoid, detect, warn of, or control the fraud. NPRM at 14. The Commission also questions whether this apportionment should be based upon a comparative negligence theory, noting that apportionment would require the Commission to define the specific responsibilities of each of the parties involved to either secure, provide warnings or offer educational services. Id. Finally, the Commission requests comment on whether arbitration or mediation should precede Commission involvement. Id.

The Joint Commenters strongly endorse the adoption of rules which would apportion liability based on a party's relative degree of fault or pursuant to a comparative negligence theory as a means of providing each segment of the industry with an economic incentive to fight toll fraud. In the past, fears of adverse publicity, proprietary information concerns and a "pass the buck" mentality have inhibited commitment to the development and implementation of toll fraud solutions. Under a comparative negligence approach, liability would be assigned to the various parties involved based on the extent to which the party in question met its duties with regard to toll fraud, thereby providing appropriate incentive for parties to implement whatever protective measures are available.

The applicable duty would vary depending upon the parties' relationship to the toll fraud situation. For example, the end user would be required to secure its equipment or communications system to the extent reasonably possible. The manufacturer would be required to provide warnings and educational material as to the risk of toll fraud associated with use of

its product as well as to provide advice as to methods of minimizing that risk. The manufacturer's duty should extend to its sales agents or vendors.<sup>11</sup> The long distance carrier and local exchange carrier<sup>12</sup> should be required to provide warnings as to the risk of toll fraud, make available educational materials, and provide whatever network-based prophylactic measures are available.<sup>13</sup> All parties should be required to cooperate fully with law enforcement agencies in apprehending and prosecuting perpetrators. In this manner, all parties with an opportunity to help minimize the risk of toll fraud have the economic incentive to do so.<sup>14</sup>

The Joint Commenters note that the issue of toll fraud liability sharing was addressed in a bill on toll fraud proposed by Representative Edward J. Markey, D-Mass, Chairman of the House Telecommunications Subcommittee. See H.R. 6066, 102d Congress, 2d Session, September 30, 1992. H.R. 6066 took a strong pro-consumer stance on toll fraud, but also recognized that toll fraud prevention must be the responsibility of consumers, carriers, manufacturers and vendors alike. H.R. 6066 would have apparently required that liability for toll fraud charges be apportioned between or among the parties consistent with their relative

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<sup>11</sup> The duty of the vendor is discussed, infra at 11-12.

<sup>12</sup> The Bell Operating Companies ("BOCs") generally disclaim any responsibility for toll fraud, taking the position that their responsibility ends at the demarcation point. Moreover, the BOCs typically provide no assistance whatsoever in resolving and tracking toll fraud occurring over long distance facilities.

<sup>13</sup> Many long distance carriers monitor usage patterns and notify customers upon detection of an unusual calling pattern. The practice of notifying customers of unusual calling patterns should be an affirmative duty of the carrier where it undertakes such monitoring activities. The extent to which the carrier meets this duty should be appropriately considered in the comparative negligence calculus.

<sup>14</sup> See Petition of Pacific Mutual Life Insurance Company, filed January 30, 1991, at 40-45, (Public Notice, DA 91-284 (March 14, 1991)), and Toll Fraud and Telabuse, at 320-330 for detailed proposals on toll fraud liability apportionment.

responsibility, with a cap on customer liability of 33-1/3 percent. However, if the customer were found negligent, the 33-1/3 cap would not apply.

The Joint Commenters likewise support the adoption of a requirement that parties contesting toll fraud liability first seek arbitration prior to requesting relief from the Commission. Of course, the arbitration should be based upon the comparative negligence liability rules discussed above. Arbitration is appropriate because it will reduce the costs of proceeding for all parties and generally will provide a swifter resolution of the dispute. Moreover, arbitration will eliminate the need for the Commission to become involved in the vast majority of toll fraud cases, thereby conserving the Commission's scarce and frequently overtaxed resources.<sup>15</sup>

In conclusion, rules apportioning liability based on a party's relative degree of fault should be adopted, with arbitration preceding Commission action.

#### IV. Equipment Proposals

The Commission's NPRM proposes modifications to its Part 68 equipment registration rules<sup>16</sup> to require prominent and conspicuous warnings regarding the potential risk of toll fraud to be placed on the exterior packaging of PBX and other equipment and in the instruction manual or other literature accompanying the equipment. NPRM at 23. The

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<sup>15</sup> The Joint Commenters note that H.R. 6066, supra, provided that billing disputes between or among the end user, the carrier, the manufacturer and the vendor would be subject to arbitration at the option of the end user. The arbitration would be conducted using the H.R. 6066 liability apportionment plan set forth above and in accordance with the rules of the American Arbitration Association. H.R. 6066 also provided that the expense of arbitration would not be borne by the customer and that carrier service to the customer could not be disabled or discontinued as a consequence of the arbitration.

<sup>16</sup> See 47 C.F.R. §§ 68.200-68.318.

Commission further proposes to require that warnings in instructional manuals discuss the customer's financial exposure and any measures available to limit that exposure. Id.

The Joint Commenters support prominent and conspicuous warnings on PBX and related equipment as necessary protective measures to ensure that consumers are made aware of the significant toll fraud risks associated with the use of PBX systems. Such a requirement complements the general approach adopted in the NPRM of combatting toll fraud through education, including the imposition of an affirmative duty upon carriers to warn customers of the risks of toll fraud.

The language of the proposed equipment rule requiring warnings to be "prominent and conspicuous" is particularly important because, historically, PBX manufacturers have failed to warn users that toll fraud can occur through use of PBX equipment, apparently fearing that explicit warnings would reduce sales and thereby reduce their bottom line. Therefore, requiring that warnings are placed prominently and conspicuously will allow consumers to raise questions as to how to safeguard PBX equipment and will provide incentives for manufacturers to develop technological toll fraud safeguards as well as educate consumers as to proper PBX configuration to minimize the risk of toll fraud.

The Commission's proposal to require warnings in instructional manuals or other literature of the potential financial exposure due to toll fraud associated with use of PBX equipment is critical to the success of the Commission's effort to educate consumers. This is so because merely warning consumers that a PBX may be penetrated and that unauthorized calls may result does not warn of the extent of potential liability. Instead, warnings in instructional manuals must use unambiguous, specific language warning that use of PBX equipment has in

fact resulted in carrier billing for unauthorized calls placed by third parties in amounts exceeding several hundred thousand dollars. The warnings should also explicitly state that precautionary measures (which should be described in detail when possible) may be used to limit, but not eliminate this exposure.

The Commission proposes to require that where PBX and similar equipment is equipped with default codes for remote access, those codes must be fully explained in the instructional manual or literature, and the risk of using the equipment without changing the default codes must be explained. NPRM at 23. In light of the fact that a significant percentage of toll fraud occurs via remote access features (which utilize access codes), the Joint Commenters strongly support this specific proposal. Clearly, warnings as to the use of access codes must be an integral part of the manufacturer's duty to educate and warn the customer.

The Commission queries whether these requirements should be imposed on only newly-registered equipment or on all equipment registered under Part 68. Id. The Commission's equipment education and warning requirements should apply to both new and existing equipment. It is particularly important that the requirement apply to existing equipment, as this equipment tends to lack the fraud prevention software and technology which has been developed in recent years.

The Commission also seeks comment on whether it should adopt standards for determining whether registrations for particularly risk-prone equipment should be revoked, and whether warnings and educational material on toll fraud should be provided as updates to manuals currently in use. Id. The Joint Commenters support both proposals. The Commission must have some method of enforcing its equipment rules, and registration revocation would

supply such an enforcement tool.<sup>17</sup> In addition, the Joint Commenters further suggest that the Commission require that applicants seeking registration for new equipment certify that owners of existing, embedded equipment have been supplied with updated manuals containing warnings and educational material as to the risks associated with toll fraud and means of limiting that risk. This certification requirement would be more efficient, because the Commission would not need to commit its resources to revocation proceedings, and more effective, because equipment manufacturers would have to comply to survive in today's new-product oriented market. The certification requirement coupled with the possibility of revocation would help protect consumers using existing equipment. This is important because, as noted above, end users which rely upon existing equipment are particularly at risk due to the lack of access to warnings and educational materials at the time of purchase and installation. Thus, warnings in the form of manual-updates should be required for all equipment currently in use.

Finally, the Commission seeks comment on how others in the distribution chain for equipment could aid in the education of consumers as to the risks of toll fraud. NPRM at 23. The responsibility of PBX and other equipment vendors with regard to toll fraud is practically ignored in the NPRM, leaving a significant gap in the chain of incentives the Commission proposes to establish to ensure that all responsible parties share the burden of fighting toll fraud.

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<sup>17</sup> It should be noted that the Commission is separately proposing an equipment registration revocation procedure. See In re Correction of Part 68 Typographical Errors, Clarifications and a Proposal for Part 68 Registration Revocation Procedures, Notice of Proposed Rulemaking, CC Docket 93-268, released November 22, 1993. In lieu of adopting separate standards for the revocation of a registration, the Commission should clarify, preferably in Docket No. 93-268, that equipment shown to be particularly susceptible to remote penetration for purposes of toll fraud is subject to registration revocation.

End users typically rely upon the vendor from whom the PBX is leased or purchased to configure and install the equipment. Indeed, the vendor is the party with whom the end user typically has direct contact regarding the proper use of its PBX. Currently, however, the vendor has little incentive to disclose to a would-be customer the fact that the equipment it hopes to sell can be the source of hundreds of thousands of dollars of unauthorized telephone calls. Like manufacturers, vendors fear disclosure will decrease sales.<sup>18</sup> Thus, the Commission must ensure that vendors, like manufacturers, have a duty to warn and educate consumers as to the toll fraud risk associated with PBX equipment.

Given the Commission's probable lack of jurisdiction over vendors, this can be accomplished by clarifying that the proposed equipment rules extend to manufacturers and their agents (which include vendors). Manufacturers which fail to ensure that their vendors follow the Commission's rules would then become subject to the Commission's forfeiture provisions as well as any registration revocation provisions.

In conclusion, the Commission should require the placement of conspicuous warnings on equipment packaging and in instructional manuals, including warnings in manuals which disclose unambiguously the potential financial exposure attributable to toll fraud. In addition, the equipment rules should apply to both newly-registered and existing equipment, address preset default codes, include registration revocation as a penalty, and extend to manufacturer's sales agents or vendors.

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<sup>18</sup> Manufacturers and vendors both usually incorporate language into their contracts which totally or substantially shield them from liability in the event of toll fraud.

**V. The Commission's Proposal To Enhance Coordination Should Be Implemented**

In its NPRM, the Commission requests comment on ways in which to achieve closer and continuing coordination among institutions fighting toll fraud, and specifically seeks comment on whether a new Federal Advisory Committee representing all affected interests should be formed to recommend specific solutions to the toll fraud problem. NPRM, at 9. Moreover, the Commission questions whether it should join with law enforcement authorities to encourage the enactment of legislation which clearly defines and penalizes toll fraud as a criminal activity and gives law enforcement the tools it needs to track and prosecute toll fraud perpetrators. Id.

The Joint Commenters support the Commission's proposal to create a Federal Advisory Committee as a means of achieving closer and continuing coordination among institutions fighting toll fraud.<sup>19</sup> A Federal Advisory Committee will help overcome several factors currently impeding cooperation. First, as noted above, the toll fraud problem has been plagued by a "politics of denial" in which the disparate institutions affected by toll fraud attempt to minimize the problem or engage in finger pointing and attempt to pass the blame to another segment of the industry. A Federal Advisory Committee composed of members of these disparate groups will help bring the toll fraud problem into the limelight and encourage involved parties to collaborate on a solution. Thus, group members will have the incentive to work together to develop and suggest solutions to toll fraud, which will then be made available to the industry.

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<sup>19</sup> A Federal Advisory Committee, as proposed by the Commission, would "represent all affected interests" and would recommend specific solutions" to the toll fraud problem. NPRM, at 9.

Second, a Federal Advisory Committee would centralize and formalize the effort to track toll fraud from network loophole to network loophole, and from telecommunications technology to telecommunications technology, which will allow the institutions fighting toll fraud to shift resources as needed. Centralized tracking is important in light of the fact that toll fraud has, over time, migrated from technology to technology as new telecommunications devices are created and new barriers to fraudulent use are erected. Thus, a Federal Advisory Committee will enable a unified response to existing forms of toll fraud, as well as new forms which will invariably emerge in the future.

The Joint Commenters encourage the Commission to initiate cooperation with law enforcement agencies in obtaining legislation which clearly defines and provides substantial criminal penalties for toll fraud. Commission requests for Congressional action made in concert with requests for similar action by law enforcement will be more likely to receive prompt Congressional attention and will highlight the commitment of these two groups to cooperation in the elimination of toll fraud.

In sum, the creation of a Federal Advisory Committee will enhance the industry's ability to cooperatively track and combat toll fraud, and do so on a continuing basis. Likewise, the Commission should cooperate with law enforcement in seeking legislation appropriately defining and penalizing toll fraud.

## V. Conclusion

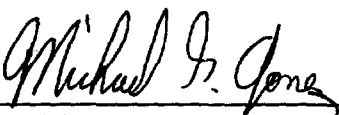
As demonstrated above, the Commission should eliminate carrier immunity from toll fraud liability through application of the carrier's tariff. Moreover, the Joint Commenters have shown that the Commission should adopt rules apportioning liability based upon each party's relative responsibility and should mandate that disputes as to application of the Commission's liability rules be decided by arbitration.

The Joint Commenters have established that the Commission's proposal to enhance consumer education of the risks of toll fraud by requiring PBX and other equipment manufacturers to provide conspicuous, prominent and unambiguous written warnings should be adopted. Warnings included in instructional manuals must unambiguously disclose the financial exposure associated with use of PBX equipment. Such warnings should accompany both newly-registered equipment as well as equipment already in place, and must address the risks of using PBX equipment without changing default codes. Manufacturers seeking new equipment registrations should be required to certify that owners of existing, embedded equipment have been supplied with updated manuals warning of the risks of toll fraud and providing advice as to methods of limiting those risks. Moreover, the warning requirement should extend to manufacturer's sales agents or vendors, because end users to a large extent rely on these entities for instruction in the use of a PBX system.

Finally, as the Joint Commenters demonstrate above, a key component of the Commission's plan of action should be the creation and continued support of cooperative efforts to monitor and combat toll fraud as it migrates to new technologies and finds new methods of access to the network.

Respectfully submitted,

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